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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-196562

DATE: July 7, 1980

MATTER OF: Burnell A. Tickle - Retroactive Temporary
Promotion

DIGEST: Employee of the Department of Energy appeals action of Claims Division which denied his claim under Turner-Caldwell for a retroactive promotion and backpay. That action is sustained since higher grade duties to which employee claims he was detailed were not classified and established as a higher grade position. Agency is not estopped to deny existence of established higher grade position by reason of its failure to classify duties and establish position for over one year.

[Claim

By a letter dated September 11, 1979, Mr. Burnell A. Tickle, through his attorney, appealed Settlement Certificate No. Z-2416546, issued July 18, 1979, which denied his claim based on our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), for retroactive temporary promotion and backpay.

Mr. Tickle, a GS-14 EEO Specialist in the Office of Equal Opportunity, Department of Energy (DOE), submitted a claim to DOE on October 6, 1978, alleging that he had performed the duties of Chief, Division of Operations, Office of Equal Opportunity, a GS-15 position, from October 1, 1977 until October 6, 1978. His claim was administratively denied on November 16, 1978, by the Department of Energy which stated in part:

"Upon the activation of the Department of Energy, all employees transferring into DOE from its component agencies transferred with their functions as of October 1, 1977. Your position at the time of your transfer was Equal Opportunity Specialist, GS-160-14. Your memorandum states that you were required to perform the duties of Chief, Operations Division, and that the duties of that position were at the GS-15 level.

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"No action was ever initiated by the Office of Equal Opportunity (EO) to formally establish the position of Chief, Operations Division. The assignment was, in effect, an interim measure to facilitate the control and functioning of the office. Under an agreement with the Civil Service Commission, individuals mass transferred to DOE first tier units were assigned to interim duties in their current grades pending the establishment and approval of realigned organizations in DOE and preparation of new position descriptions."

Mr. Tickles' claim was denied by our Claims Division (now Claims Group, FGMSD) on July 18, 1979, for the same reason, that there was no classified and established position at the GS-15 grade level covering the duties to which Mr. Tickles was assigned. The Claims Division further noted that Civil Service Commission (now Office of Personnel Management) Bulletin No. 300-40, issued May 25, 1977, which contained guidelines for implementing our Turner-Caldwell decisions, required that a detail be to an "established position classified at a higher grade" before an employee is eligible for a retroactive temporary promotion.

In his appeal Mr. Tickles does not dispute the Claims Division's finding that the higher grade duties were not formally classified and established as a position. Rather, he urges that the requirement of an "established position classified at a higher grade" is not applicable to his situation since his detail lasted for over one year due to DOE's delay in classifying positions in the Office of Equal Opportunity. He concludes by stating that the Department should be estopped from asserting that the position did not exist or that he was not performing duties at a higher grade when the Department allowed him to serve in the position for a long period and replaced him with a GS-15.

Mr. Tickles' argument that the Government should be estopped from denying that he was detailed to a higher grade position is similar to the argument addressed in Ardeth D. Potts, B-196625, February 20, 1980. In that case the employee claimed that she should be regarded as having been detailed to the duties of a "de facto" higher grade position despite management's failure to officially establish that position. In that case, as in Mr. Tickles', the detail extended for a period in excess of one year and the higher grade duties were at one point established as a higher grade position. In denying her claim, we stated:

"Ms. Potts bases her appeal on her contention that the evidence shows a de facto position was created despite management failure to officially establish a position. There are innumerable instances in the Government service where employees perform certain duties of a higher classification, but as a general rule an employee is entitled only to the position to which he or she is actually appointed, regardless of the duties performed. When an employee performs duties normally reserved to employees in a grade level higher than the one held, the employee is not entitled to the salary of the higher grade level until such time as the employee is promoted to that grade. Dianish v. United States, 183 Ct. Cl. 702 (1968); 55 Comp. Gen. 515 (1975).

"This principle was confirmed in United States v. Testan, 424 U.S. 392 (1976), a case involving the issue of entitlement of an employee to backpay for errors in position classification levels. The Supreme Court ruled that an employee is only entitled to the salary of the position to which appointed and that neither the Classification Act nor the Back Pay Act creates a substantive right in the employee to backpay

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for the period of any claimed wrongful classification. Ronald J. Beach, B-195480, November 8, 1979. Ms. Potts could not have been promoted to a position which was not classified. Hubert J. Buteau, B-187287, May 13, 1977."

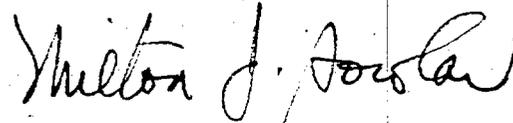
The argument of estoppel is unpersuasive for essentially the reason quoted above that an employee is entitled by law only to the pay of the position to which he is appointed. Because the Government is not bound beyond the authority conferred on it by statutes and regulations, we rejected estoppel as a basis for holding the detailed claimant entitled to the pay of a higher grade GS-16 position where the agency was without authority to unilaterally place an employee in a super-grade position. Scott N. Lee, B-196561, March 5, 1980. Similarly, because an employee cannot be promoted, either temporarily or permanently, to a position that has not been classified and established, an employee detailed to unclassified duties may not be given a retroactive temporary promotion with backpay based on the agency's delay in establishing the higher grade position. Thus, in Donald L. Colbert, B-195923, November 26, 1979, we rejected the employee's argument that he was entitled to backpay for a 10-month detail to unclassified higher grade duties on the basis that the agency was obligated to classify the new position within 120 days.

We cannot agree with the additional argument suggested by Mr. Tickles that his is not a classification issue in that the higher grade duties were not misclassified. Whether a position is classified incorrectly or whether it should have been but was not classified, the matter is one relating to classification of the higher grade duties. Although the facts in Testan involved employees who claimed their positions were incorrectly classified, the Supreme Court's holding was that the Classification Act did not change the established rule that one is entitled

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only to the pay of the position to which he is appointed. This rule is applicable as well to situations in which the agency has failed to classify and establish a set of duties in accordance with that Act.

Because the duties to which Mr. Tickles was detailed were not those of a classified and established position, we sustain the action of the Claims Division in denying his claim for a retroactive temporary promotion and backpay.



Acting Comptroller General
of the United States